

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

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PRATT (CORRUGATED LOGISTICS), LLC)	
)	
Respondent,)	
)	
and)	CASE NOS. 04-CA-079603
)	04-CA-079858
TEAMSTERS LOCAL 773)	04-CA-079975
)	04-RC-080108
Charging Party.)	
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**RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respondent, **PRATT (CORRUGATED LOGISTICS), LLC** ("Corrugated Logistics", the "Company," or the "Respondent"), pursuant to Section 102.46 of the Board's Rules and Regulations, hereby files Respondent's Exceptions to the Decision of the Administrative Law Judge ("ALJ") in the above-captioned matter. In support of these exceptions, the Company also concurrently files Respondent's Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge.¹

Respondent excepts to the following findings of fact as contrary to the record evidence:

1. Respondent's "affiliate, Pratt Corrugated of Allentown, has a large production and manufacturing plant." (ALJD at 2, ll.48-49).

There is no company by the name of "Pratt Corrugated of Allentown." At trial, the allegation that Respondent shared single employer status with other companies named in the

¹ Citations to the ALJ's Decision by page and line number appear as "(ALJD at p. __, ll.__)." References to the transcript of proceedings appear as "(Tr. __)". References to the General Counsel's and Respondent's exhibits appear respectively as ("GC Exh. __") and ("Resp. Exh. __").

Amended Complaint was withdrawn. No evidence whatsoever was presented to establish that Pratt (Allentown Corrugating), LLC or Pratt Industries (USA), Inc. are legally “affiliated” with Respondent Corrugated Logistics.

2. Corrugated Logistics’ employees worked “in close proximity to and [had] contact with employees of related Pratt entities...” (ALJD at 3, fn. 3).

No record evidence supports any finding other than that Respondent provides transportation services to Pratt (Allentown Corrugating), LLC., which is one of its customers.

3. Francisco Ortiz “directed and assigned work to the yard jockeys and drivers.” (ALJD at 3, ll 15).

Aside from a general stipulation regarding Ortiz’s agency status (Tr. 225, 226), the record is devoid of evidence that Ortiz “assigned” or “directed” Respondent’s employees. Moreover, General Counsel did not contend and the record does not support a finding of Section 2(11) supervisory status.

4. Union Business Agent Darren Fry “went to the [Respondent’s] Macungie facility and passed out leaflets to some of Respondent’s drivers as they were leaving the premises on their runs.” (ALJD at 3, ll. 39-40).

The sum total of the record evidence regarding Fry’s activity is that he stationed himself near the Macungie facility on two occasions. On April 13, 2012, Fry handed out a single flyer to one, unnamed driver whom Fry never saw again. (Tr. 47, 48). On April 19, 2012, Fry handed out a flyer to two drivers. Those two visits, off of the Company’s property, constitute the entirety of Fry’s “visits.” There is no evidence whatsoever that anyone in management saw or was aware of Fry’s activity.

5. Alleged discriminatee Christian Salazar’s conversations with other employees

“about supporting the Union” and “meet[ing] with Fry” took place “**mostly in person and in the yard at the Macungie facility.**” (ALJD at 4, ll. 6-7).

Salazar testified only that that he “called” other drivers while on the road making a delivery to gauge their interest in the union. (Tr. 67, ll. 9-14). There is no evidence that anyone in management witnessed or was aware of the alleged conversations between Salazar and any of the other drivers.

6. “At some point in the next few months, Respondent apparently stopped using NFI drivers because it hired those drivers as Respondent’s employees. There is no reliable evidence, certainly no documentary evidence, that drivers from external carriers were used again at Macungie until late April when Respondent laid off most of its existing drivers.” (ALJD at 3, ll. 27-31).

It is undisputed that at all times Respondent continued to use outside carrier National Freight Industries (“NFI”). In fact, alleged discriminatee Christian Salazar, whose testimony the ALJ credits, specifically testified that the Company “always used” NFI. (Tr. 82-83).

7. “When Salazar’s tractor-trailer was making a turn coming off an exit ramp, it became embedded on a railing.” (ALJD at 4, ll 44-45).

The ALJ’s characterization of this very costly and potentially life-threatening accident is so passive as to make the incident appear to have happened on its own without any involvement of Salazar. The ALJ’s description of the accident does not even jibe with the testimony of Salazar himself, who admitted that “I overturned the truck on the exit ramp.” (Tr. 55).

8. “Olshefski testified that he completed his investigation [of Salazar’s accident] in

the middle of January, but he never gave a reason for the delay in implementing the discharge decision, which is perplexing since he apparently knew Salazar was back driving.” (ALJD at 17, ll. 42-45).

The ALJ is simply incorrect. Olshefski explained the reason for the interval between the time he concluded his investigation of Salazar’s accident and the time he implemented the decision to terminate Salazar. Olshefski testified that because Salazar was working light duty in the office following the accident he simply became a “softened focus” until Olshefski began to analyze the issue of rebalancing the workforce at Macungie in light of the high costs associated with damage to equipment caused by the drivers. (Tr. 355, 356).

9. “It is uncontradicted that, at no time before the April 24 meeting, did Powell or any other representative of Respondent tell Mejia that he was in danger of losing his job.” (ALJD at 7, ll 21-23).

Contrary to the ALJ’s assertion, GC Exhibits 10 and 11, the March 30 and April 4, 2012 disciplinary reports issued to Mejia, both explicitly notify Mejia that his “Timetable for improvement” is “immediate”, and that the “Consequences for failure to improve” are “Discipline up to and including discharge.” Mejia admitted signing both disciplinary reports. (Tr. 109, 110; G.C. Exhs. 9 and 10).

10. Francisco Ortiz “is apparently employed by Pratt Corrugated, identified by Powell as her ‘customer’ and a Respondent-affiliated company at the Macungie facility...”

The uncontradicted record evidence is that Ortiz is an employee of Pratt (Allentown Corrugating), LLC. (Tr. 49). Moreover, the record is devoid of any evidence that Pratt (Allentown Corrugating), LLC is a “Respondent-affiliated company.” Because the General Counsel failed to present any evidence regarding the scope of Ortiz’s 2(13) agency status, the

ALJ's unfounded conclusions of legal affiliation between Respondent and Ortiz's employer is clearly an effort to make the General Counsel's case that the alleged unlawful statements of Ortiz should be imputed to the Respondent.

11. "Ortiz was the only **supervisor** who dealt with Mejia and the nighttime yard jockey when Powell was not present. He was also the only supervisor present when drivers returned from their runs after Powell left for the day." (ALJD at 9, ll 20-22).

The parties entered into a general stipulation regarding Ortiz's 2(13) status. (Tr. 225, 226). The General Counsel failed to establish the scope of that status. Any reference to Ortiz as a "supervisor" of Respondent's employees is unsupported by the record evidence. Moreover, even the General Counsel did not assert in the Complaint that Ortiz is a Section 2(11) supervisor.

12. "On the day of the layoff, a sign advertising for drivers remained posted at the Macungie facility." (ALJD at 12, 13, ll 34).

The ALJ totally ignored the uncontradicted record evidence. The unrebutted testimony is that during the relevant period the sign was leaning against stairs "out of sight." (Tr. 418). This out-of-the-way sign was certainly not a solicitation for new hires, as the ALJ concluded.

13. The ALJ failed to make findings regarding the unrebutted testimony of Craig Anderson, Vice President of Regional Sales for U.S. Express specifically that Tom Olshefski contacted him in November 2011, months prior to any alleged union activity, to discuss U.S. Express's ability to provide third party logistics services to the Macungie operation.

14. The ALJ failed to consider the e-mail that Anderson sent to Olshefski which unmistakably shows that they had been discussing a restructuring of the Macungie operations (to increase the use of third-party carriers and reduce the number of direct hire drivers) well prior to any alleged union activity. (Resp. Exh. 4).

15. The ALJ's failure to find that a factor in Tom Olshefski's decision to restructure the Macungie operations was Phaedra Powell's admitted inexperience in handling certain aspects of the operation. (Tr. 375, 376).

16. The ALJ engaged in rank speculation by concluding that "some of the damages [to the equipment] could have been attributable to the leased equipment itself and not to the drivers at all. And there was no way to determine whether NFI drivers, who were driving some trailers during this period were responsible for at least some of the damages..." (ALJD at 21, ll. 39-42).

Respondent excepts to the ALJ's below mixed findings of fact and law regarding the 8(a)(1) allegations attributed to the alleged statements of Francisco Ortiz:

17. The ALJ's reliance on the internally contradictory, confused testimony of alleged discriminatee Michael Messina to support the Section 8(a)(1) allegations between Messina and Ortiz. (ALJD at 9, 14)(Tr. 143, 144).

18. Francisco Ortiz's alleged questioning of Denis Cortes was coercive and therefore a violation of Section 8(a)(1). (ALJD at 14, ll. 16-17).

19. Ortiz's statements to Cortes "amounted to an unlawful threat of reprisal in violation of Section 8(a)(1)." (ALJD at 14, ll. 20-24).

20. Ortiz's "remarks [to Cortes] also suggested that Respondent knew who was involved in union activities" thus "creat[ing] an impression of surveillance" in violation of Section 8(a)(1). (ALJD at 14, ll. 24-26).

21. Ortiz's "warning to Messina was an additional threat of reprisal in violation of Section 8(a)(1) of the Act." ALJD at 14, ll. 34-35).

Respondent excepts to the ALJ's below mixed findings of fact and law regarding the 8(a)(1) allegations attributed to the alleged statements of Jason Greer:

22. The General Counsel failed to provide the requisite foundation for GC Exhibit 19, the one-page document that was purportedly taken from Jason Greer's website, and the ALJ's reliance upon and findings based upon that document are in error.

23. "Greer's appearance and statements [to employees] were a response to the nascent, but ongoing union campaign" (ALJD at 14, ll. 41-42). There is no record evidence whatsoever to support this conclusion.

24. "The timing of Greer's appearance, his background and his furtive reluctance to reveal his last name support the inference... that his promise to resolve the grievances was conditioned on the employees rejecting the Union." (ALJD at 14, 15, ll. 44-45, 5).

25. "Greer's solicitation of grievances with the promise to resolve them amounted to still another violation of Section 8(a)(1) of the Act." (ALJD at 15, ll. 8-9).

26. "Respondent brought in a consultant who unlawfully solicited grievances with the promise to resolve them without a union." (ALJD at 16, ll. 6-7).

27. It is "uncontradicted that Greer identifies himself as a 'union buster' on one screen of his web page" which was never presented to any witness, and never offered into evidence. (ALJD at 11).

Respondent excepts to the ALJ's below mixed findings of fact and law regarding the alleged 8(a)(3) allegations pertaining to the discharges of alleged discriminatees Salazar and Mejia:

28. "... in the context of the Respondent's Section 8(a)(1) violations, the evidence makes a compelling case that the terminations of Salazar and Mejia were motivated by their contemporary union activities." (ALJD at 16, ll. 14-16).

29. "Also pretextual were the reasons given for the discharge of Salazar, who was

allegedly fired for an accident he was involved in almost 4 months before and for the discharge of Mejia, who was allegedly fired for two ambiguous incidents that were not mentioned to him when they happened.” (ALJD at 16, 17, ll. 33-34; 5-7).

30. The ALJ substituted his business judgment for Corrugated Logistics by concluding “If the Respondent had only legitimate reasons for the discharge and if it was honestly concerned about damage and safety issues, it would have discharged [Salazar] sooner or notified him that his job was in jeopardy and would not have permitted Salazar to go back on the road driving trailers.” (ALJD at 17, ll. 28-31).

31. The ALJ concluded out of whole cloth: “I find that Powell likely knew the real reason for Salazar’s discharge and likely shared it with Ortiz.” (ALJD at 18, ll. 15-17).

32. “Not only did Mejia not know there was any impropriety on his part, but he could not know even that there was an ‘incident,’ because presumably Powell gives a lot of instructions to Mejia. It would thus have been difficult for Mejia to know what Powell was talking about in the April 24 meeting.” (ALJD at 19, ll. 37-40).

33. “In a remarkable coincidence both the April 16 and 23 incidents involved the same subjects discussed in the two prior lawful disciplinary reports. I find that this was no coincidence. Respondent used the April 16 and April 23 incidents as pretext to mask a discriminatory reason for the discharge of Mejia.” (ALJD at 20, ll. 13-17).

Respondent excepts to the ALJ’s following mixed findings of fact and law regarding the alleged 8(a)(3) allegations pertaining to the layoffs of the remaining alleged discriminatees:

34. The April 27 layoff of 15 drivers was unlawful. (ALJD at 16, ll. 18-20).

35. “The April 27 layoffs themselves made no sense on an objective basis.” (ALJD at 16, ll. 27-28).

36. The Respondent's "asserted reason for the April 27 layoff was pretext..." (ALJD at 20, ll. 31-32).

37. "...Respondent's stated reason for the layoffs, a need to use third-party external drivers instead of its own employees, was a pretext." (ALJD at 16, ll. 32-33).

38. "This chaotic transition is not the way an employer with a legitimate reason to replace existing drivers with drivers from third-party carriers operates." (ALJD at 20, ll. 48-49).

39. Nothing in Powell's testimony suggests that Olshefski said anything about considering the work records of the drivers in determining who was to be laid off. This conflict is a serious impediment to accepting Olshefski's testimony." (ALJD at 21, ll. 9-16).

Respondent excepts to the ALJ's Conclusions of Law

40. Corrugated Logistics excepts to the ALJ's summary conclusions of law set forth in Paragraphs 1 through 4 of the section in the ALJ's decision titled "Conclusions of Law." These conclusions of law are erroneous and contrary to the law and facts in this case as will be discussed in more detail in the Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge.

41. Corrugated Logistics excepts to the ALJ's recommended remedy and/or any alternative remedy as Respondent did not violate the Act in any manner and no remedy is warranted.

Respondent additionally excepts the following:

42. The ALJ's failure to correctly apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), or to even consider the analysis set forth in *Baptista's Bakery, Inc.*, 352 NLRB 547 (2008), *Gem Urethane Corp.*, 284 NLRB 1349 (1987), and *Framan Mechanical*, 343

NLRB No. 53 (2004) to the 8(a)(3) allegations of unlawful discharge regarding the alleged discriminatees. (See also, e.g. *Timney Rebar Services, Inc. et al*, 354 NLRB No. 61 (2009), *Aero Detroit, Inc.* 321 NLRB 1101 (1996)). (ALJD at 15 - 22).

43. The ALJ's failure to analyze and make a legal finding regarding the nature and extent of Francisco Ortiz's 2(13) authority.

44. The ALJ's failure to apply well accepted Board precedent that the party asserting agency status bears the burden of establishing that the alleged actions of the agent were taken **within the scope** of the agent's authority. See, e.g. *NLRB v. General Industrial Electronics, Co.*, 401 F. 2d 297 (8th Cir. 1968).

45. The ALJ finding that labor consultant Jason Greer is an agent of Respondent. The cases relied upon by the ALJ are completely distinguishable or entirely fail to support the proposition for which they are cited.

46. The ALJ's failure to acknowledge Board precedent prohibiting reliance on purely circumstantial evidence or speculation regarding the employer's alleged anti-union animus in making discharge decisions. (See, e.g. *The American League of Professional Baseball Clubs*, 189 NLRB 541 (1971), *Caribe Ford*, 348 NLRB 1108 (2006)).

47. The clear preponderance of the relevant evidence establishes that the ALJ made erroneous credibility resolutions.

48. The ALJ failed to make findings regarding the relevant, un rebutted record evidence that Respondent was aware of Michael Messina's long-time, 23-year membership in the Teamsters at the time it hired him. (Tr. 418; Resp. Ex. 12).

49. The ALJ's erroneously concluded that the General Counsel established a prima facie case of any 8(a)(1) violations on the basis of alleged statements of Francisco Ortiz.

50. The ALJ misapplied Board law in concluding that the General Counsel established a prima facie case of any 8(a)(1) violations on the basis of alleged statements of Jason Greer.

51. The ALJ's findings and conclusions that the General Counsel established a prima facie case of an 8(a)(3) violation pertaining to the discharge Christian Salazar.

52. The ALJ's findings and conclusions that the General Counsel established a prima facie case of an 8(a)(3) violation pertaining to the discharge Guillermo Mejia.

53. The ALJ's findings and conclusions that the General Counsel established a prima facie case of an 8(a)(3) violation pertaining to the layoff of the remaining alleged discriminatees named in the Amended Complaint.

54. The ALJ's finding that because "[N]othing in Powell's testimony suggests that Olshefski said anything about considering the work records of the drivers in determining who was to be laid off" this represents a "conflict" in Powell's and Olshefski's testimony that is a "serious impediment to accepting Olshefski's testimony." (ALJD at 21, ll 9-16).

The ALJ is simply wrong. There is no "conflict" here at all. The ALJ fails to understand that Olshefski need not have shared all the details of his methodology for determining which employees to lay off. The ALJ's rejection of Olshefski's testimony on the basis that Powell did not corroborate it is absurd given that Olshefski had a

reasonable business justification to not notify her of the details of his personal considerations.

55. The ALJ's finding that Olshefski was aware of the union activity of Macungie drivers.

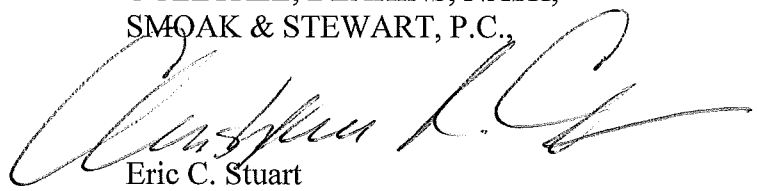
56. The ALJ's failure to find that Ortiz told Messina that he was instructed not to make any comment about the Teamsters. (TR 157).

57. The ALJ's failure to make any finding or even to consider the testimony of alleged discriminate Cortes that he learned Mejia was fired solely because he "does what he wants in the yard." (Tr. 255).

58. The ALJ failed to find that Olshefski, the unrebutted decision-maker regarding the Company's plans to rebalance the Macungie operations, lacked knowledge of any union activity at the time he made the layoff decisions.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.,



Eric C. Stuart
Christopher R. Coxson

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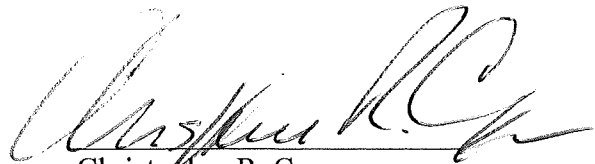
CERTIFICATE OF SERVICE

I hereby certify that in accordance with the NLRB's rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of Respondent's Exceptions to the Decision of the Administrative Law Judge was timely filed via the NLRB E-filing system and was served on the following on the date below by undersigned counsel for Pratt (Corrugated Logistics), LLC via electronic mail:

Donna Brown, Esq.: Donna.Brown@NLRB.Gov

Jeremy E. Meyer, Esq.: jmeyer@cjtlaw.org

Dated this 30TH day of April 2013.


Christopher R. Coxson